Petition

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81-836

NO.

in the Supreme Court of the United States

RUSSELL LEICHT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

Does a mandatory-minimum term of imprisonment for possession of marijuana violate the Equal Protection Clause, when possession of equally or more dangerous substances, prohibited by the same Act, has no mandatory-minimum term of imprisonment?

II

The Florida Drug Abuse Statute provides mitigation from mandatory-minimum sentences for those defendants who provide the police and prosecution with "substantial assistance". Is the phrase "substantial assistance" vague and indefinite?

III

Does the mitigation provision of the Florida Drug Abuse Statute which compels incriminatory statements have to provide for "use" immunity?

IV

Does the right to be heard in mitigation of one's sentence include the right to petition for mitigation? Can the State vest the right to petition for mitigation solely in the prosecutor?

V

Does the mitigation provision deny Equal Protection of the Law to those defendants who cannot provide "substantial assistance"?

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PETITION FOR WRIT OF CERTIORARI

To: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioner, Russell Leicht, prays that a Writ of Certiorari issue to review a final judgment and order of the Supreme Court of Florida (Appendices A and B) reversing a judgment of the Circuit Court of Broward County, Florida, wherein the trial court held Florida Statute 893.135 (1979) unconstitutional.

JUDGMENT AND OPINION OF THE COURT BELOW

In an opinion rendered June 25, 1981, with rehearing denied September 24, 1981, the Supreme Court of Florida reversed the trial court's ruling and found Florida Statute 893.135 (1979) constitutional. As to Question I presented for review, the Court rendered a written opinion. As to Questions II-V, the Court rejected the Petitioner's argument and found the Statute constitutional based upon its recent decision in *State v. Benitez*, 395 So.2d 514 (1981) (Appendix C).

JURISDICTION OF THIS COURT

1. The date of judgment to be reviewed was entered by the Supreme Court of Florida on June 25, 1981, with a timely motion for rehearing denied on September 24, 1981.

This Petition is filed within 60 days from the date of denial of the motion for rehearing.

2. The jurisdiction of this Court is invoked, made and conferred under Title 28 U.S. Code, Section 1257(3) and Rules 17 through 23 of the Rules of this Court.

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

First Amendment, United States Constitution

Fifth Amendment, United States Constitution

Fourteenth Amendment, United States Constitution

Florida Statute 893.135

(The pertinent provisions are set out in Appendix D of this Petition.)

STATEMENT OF THE CASE

Petitioner, Russell Leicht, was charged by Information with the offense of "Trafficking in Cannabis in excess of 100 pounds" contrary to Florida Statute 893.135. At the pretrial level, the Petitioner moved to dismiss the cause on the grounds that Florida Statute 893.135 was unconstitutional. The trial court found the Statute unconstitutional and dismissed the cause.

The State of Florida filed an appeal, as provided by law, to the Supreme Court of Florida.

The Supreme Court of Florida reversed the trial court's ruling and held the Statute constitutional. In regards to Question I raised by the Petitioner, the Supreme Court of Florida addressed the issue on the merits and rendered a written opinion. In regards to Questions II-V, the Supreme Court of Florida rejected the Petitioner's arguments on the basis of its recent decision in *State v. Benitez*, 395 So.2d 514 (Fla., 1981).

The Petitioner's motion for rehearing was denied by the Supreme Court of Florida.

REASONS FOR GRANTING THE WRIT

I

Chapter 893, *Florida Statutes*, prohibits the sale, manufacture, delivery, importation, or actual or constructive possession of in excess of 100 pounds of marijuana (i.e., F.S. 893.135). The Statute provides for escalating mandatory-minimum periods of incarceration and escalating mandatory fines depending upon the amount of marijuana involved. The punishment ranges from a mandatory-minimum term of imprisonment of three (3) calendar years and a fine of $25,000.00 for a quantity of in excess of 100 lbs., to a mandatory-minimum term of imprisonment of fifteen (15) calendar years and a fine of $200,000.00 for a quantity of in excess of 10,000 lbs.

The "Trafficking in Cannabis" provision (F.S. 893.135) is but one subsection of Chapter 893, which is commonly known as the "Florida Comprehensive Drug Abuse Prevention and Control Act". Chapter 893 is modeled after the Federal Drug Abuse Prevention and Control Act (i.e., 21 U.S.C.A. Sec. 891 at et. seq.), and provides the same five schedules of controlled substances.

The in excess of 150 controlled substances regulated by Chapter 893 are classified under one of the five schedules. The schedules recognize that there are varying degrees of abuse; that the potential for psychological and/or physical dependence varies; and that certain substances either have no currently accepted medical use in treatment in the United States, or that there is a lack of accepted safe use for the substance.

The Statute provides for escalating mandatory-minimum periods of incarceration and mandatory fines for possession of marijuana. In contrast, Chapter 893 does not prescribe mandatory-minimum terms of incarceration and mandatory fines for the possession, sale, or manufacture in any quantity of substances which are equally or more abused, or substances which have an equal or greater potential for psychological or physical dependence. For example, an offender can sell any quantity, or dollar amount, of "LSD", "peyote", "mescaline", "amphetamines", "methamphetamines", or "barbiturates", and the sentencing court has the discretion to place him on probation and/or merely impose a fine.

This gross disparity in punishment abridges our concept of Equal Protection of the Law as guaranteed by the United States Constitution.

II

Subsection (1) of Florida Statute 893.135 provides for escalating mandatory-minimum terms of incarceration and escalating mandatory fines depending upon the quantity of marijuana involved. However, Subsection (3) provides the prosecutor may move the sentencing court to reduce or suspend the sentence of a convicted person if that person provides "substantial assistance" in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators or principals. The Subsection further provides the arresting agency may be heard in opposition to, or in support of, any motion for mitigation.

The term "substantial assistance" is not defined. Nor, are there any guidelines as to the meaning of the

term such that a sentencing judge can objectively determine whether an offender has provided "substantial assistance". The Florida Supreme Court has held that statutorially proscribed post-conviction plea bargaining is construed by a lesser "due process-vagueness" standard. The mitigation provision is unconstitutionally vague and indefinite.

III

Subsection (3), Florida Statute 893.135, provides that a person can avoid the escalating mandatory-minimum terms of incarceration and mandatory fines, if he gives testimony which substantially assists the prosecutor in the identification, arrest, or conviction of his accomplices, accessories, co-conspirators, or principals. The Statute does not offer the protection of "use" immunity for this testimony.

By definition, if one is required to give testimony about his "co-conspirators", then his testimony must be self-incriminating. His compelled testimony, to avail himself of the leniency provision, may subject him to a new prosecution. For example, a defendant may be convicted of being in possession of 100 lbs. of marijuana. In explaining his possession of that marijuana and identifying his co-conspirators, he might by necessity implicate himself in the "importation" of the marijuana as well as the "possession" of other marijuana which was a part of the load for which he was convicted. Said incriminating testimony could subject him to another State prosecution and/or Federal prosecution for importation, possession, or even racketeering (i.e., RICO).

The State prosecutor to whom he provides substantial assistance may exercise his discretion and not use his testimony against the defendant in a new prosecution. However, this would not preclude a Federal prosecutor from subpoenaing said testimony and using it in his prosecution of the defendant. The best intentions of the State prosecutor offer the defendant no protection from "use" in the Federal courts of his testimony.

The legislative history states the purpose of the mandatory-minimum sentences is to compel the cooperation of defendants. The Petitioners complain that in order to avail themselves of the "leniency provision", they are coerced into waiving their privilege against self-incrimination without any assurance their testimony will not be used against them in a new State and/or Federal prosecution. Said coercion in order to avail one's self of this statutorially created largess of leniency, unconstitutionally pierces the shield of the Fifth Amendment.

In *Roberts v. United States*, 445 U.S. 552, 100 S.Ct. 1358, 63 L.Ed.2d 662 (1980), this Court stated a properly raised Fifth Amendment claim would merit serious consideration. Question III squarely addresses that issue.

IV

Subsection (1), Florida Statute 893.135, provides the prosecutor may move the sentencing court to reduce, or suspend, the sentence of any convicted person upon the rendering of substantial assistance. The Statute provides that the arresting agency may be heard in opposition to, or in favor of, the motion for mitigation.

The Supreme Court of Florida has held that the defendant has a right to be heard at the hearing.

The Statute does not provide, nor did the Supreme Court of Florida hold, that a defendant has the right to "bring", "move" or "petition" for mitigation. Rather, a defendant has the right to merely be heard once the motion is brought. The Petitioners complain that: (1) said procedure denies access to the courts to petition for redress of grievances contrary to the First Amendment and (2) the prosecutor's unilateral access to the court denies them procedural due process, contrary to the Fifth and Fourteenth Amendments.

V

The Petitioners complain that Subsection (3), Florida Statute 893.135, denies Equal Protection of the Law to convicted defendants who cannot, or do not have the ability to provide "substantial assistance" to law enforcement officials.

The Court has Questions II through V before it in the Petition of Certiorari of DAVID COWGILL v. STATE OF FLORIDA which is presently pending. Should the Court accept certiorari in COWGILL's case, this cause should be joined in order that the Court can address the additional Equal Protection challenge raised by the Petitioners.

CONCLUSION

We submit that the Petitioners' claim involves important questions of law pertaining to the propriety of mandatory-minimum terms of incarceration; the limitations on post-conviction plea bargaining; and the relationship of the privilege against self-incrimination to post-conviction plea bargaining. The Petitioners' claim should be consolidated with other challenges to the Florida Drug Trafficking Statute pending before this Court.

We pray that Your Honors will grant the Writ of Certiorari.

Respectfully submitted,

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Appendix

APPENDIX A

IN THE SUPREME COURT OF FLORIDA

CASE NO. 58,233

STATE OF FLORIDA,

Appellant,

vs.

RUSSELL LEICHT,

Appellee.

(McDONALD, J.) The state appealed a circuit court ruling declaring Sec. 893.135, F.S. (1979),[1] unconstitutional. This Court stayed further proceedings in the instant cases because of the pending disposition of *State v. Benitez*, 395 So.2d 514 (Fla. 1981). In *Benitez*, this Court found Sec. 893.135 to be constitutional. That ruling does not entirely dispose of these two cases, however, because in the trial court the appellees presented an additional challenge to the statute's constitutionality to the ones covered in Benitez. We again uphold the statute.

Appellees contend that Sec. 893.135 violates equal protection by singling out only four[2] of the controlled substances proscribed in Sec. 893.03, F.S. (1979). They claim that many other drugs are as dangerous and as widely abused as the four for which mandatory sentences

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[1]Florida's newly enacted "drug trafficking" statute.

[2]Cannabis, Sec. 893.135(1)(a), F.S.; cocaine, Sec. 893.135(1)(b), F.S.; and morphine and opium, Sec. 893.135(1)(c), F.S.

have been enacted and that, therefore, there is no rational basis to support the classification set out in Sec. 893.135. We disagree.

As the United States Supreme Court has stated:

> "Evils in the same field may be of different dimensions and proportions requiring different remedies . . . [R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others." *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955).

Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 591-92 (1961). (Footnote omitted.) The legislature has wide discretion in creating statutory classifications, and there is a presumption in favor of validity. *North Ridge General Hospital, Inc. v. City of Oakland Park*, 374 So.2d 461 (Fla. 1979), appeal dismissed, 444 U.S. 1062 (1980); *Powell v. State*, 345 So.2d 724 (Fla. 1977). Whether equal protection has been denied depends on whether a classification is reasonably expedient for the protection of the public safety, welfare, health, or morals. *Rainey v. Nelson*, 257 So.2d 538 (Fla. 1972). A classification based on a real difference which is reasonably related to the subject and purpose of the regulation will be upheld even if another classification or no classification might appear more reasonable. *Finlayson v. Connor*, 167 So.2d 569 (Fla. 1964).

To be constitutionally permissible, a classification must apply equally and uniformly to all persons within the class and bear a reasonable and just relationship to a legitimate state objective. *Haber v. State*, 396 So.2d 707 (Fla. 1981). We find that Sec. 893.135 is neither arbitrary nor unreasonable and that its provisions apply equally to all persons similarly situated. There may, as appellees contend, be other drugs as hazardous as the ones included in Sec. 893.135. The legislature, however, has recognized the wide-spread use and abuse of marijuana, cocaine, morphine, and opium as an area of special concern and has acted accordingly. We acknowledge the magnitude of trafficking in these four drugs that exist in this state, and we have no difficulty in ascertaining a rational basis for the legislature's actions in providing escalating mandatory minimum sentences regarding these substances.

We find that Sec. 893.135 does not violate the equal protection clause and reaffirm the statute's constitutionality.[3] The trial court order is vacated.

It is so ordered. (Sundberg, C.J., Adkins, Boyd, Overton, England and Alderman, JJ., Concur.)

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[3]Due to our holding, we do not discuss appellees' arguments regarding severability.

APPENDIX B

IN THE SUPREME COURT OF FLORIDA

CASE NO. 58,233

STATE OF FLORIDA,

Appellant,

vs.

RUSSELL LEICHT,

Appellee.

Upon consideration of the Motion for Rehearing filed in the above-styled causes by attorney for Appellee RUSSELL LEICHT,

IT IS ORDERED that said Motion be and the same is hereby denied.

DATED September 24, 1981.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: Tanya Carroll
Deputy Clerk

APPENDIX C

IN THE SUPREME COURT OF FLORIDA

CASE NO. 57,834

STATE OF FLORIDA,

Appellant,

vs.

CARLOS M. BENITEZ,

Appellee.

ENGLAND, Justice.

This case comes to us on direct appeal from a trial court order determining that section 893.135, Florida Statutes (1979)—Florida's newly-enacted "drug trafficking" statute—is unconstitutional.

After Carlos and Esperanza Benitez attempted to sell one kilo of cocaine to undercover narcotics agents for $44,000, they were charged by information with "trafficking in cocaine" in violation of section 893.135. In ruling on motions to dismiss the charges, the trial court entered a lengthy order declaring section 893.135 to be facially invalid on a multiplicity of grounds. The state appeals that order, urging error in each of the trial court's rulings.

Section 893.135 is a unique response to a serious and growing concern of the legislature regarding illegal drug activities in the State of Florida. Subsection (1) of the new law establishes severe mandatory minimum

sentences for trafficking in various types of illegal drugs. Subsection (2) prevents the trial court from suspending, deferring or withholding the adjudication of guilt or the imposition of sentence on a person convicted under the law, and it eliminates the defendant's eligibility for parole during the minimum mandatory sentence. Subsection (3) provides an "escape valve" from the statute's rigors, based on the initiative of the prosecuting attorney, by permitting the court to reduce or suspend a sentence if a convicted defendant is willing to cooperate with law enforcement authorities in the detection or apprehension of others involved in drug trafficking.

Section 893.135 was enacted to assist law enforcement authorities in the investigation and prosecution of illegal drug trafficking at all levels of distribution, from the importer-organizer down to the "pusher" on the street. The harsh mandatory penalties of subsection (1), ameliorated by the prospect of leniency in subsection (3), were clearly calculated to provide a strong incentive for drug violators to cooperate with law enforcement authorities and become informers. No one argues that the elimination of illegal drug traffic is not a beneficial and worthwhile goal, or that the goals of this legislation are not meritorious.

Nonetheless, in their zeal to combat the flow and distribution of illegal drugs through this novel legislation, legislators knowingly glossed over alleged constitutional defects in the approach that was being developed. We in the judiciary do not have that luxury. Indeed, the trial judge's extensive and detailed order exhibits the multiple, serious difficulties which this statute poses under well-established constitutional principles. We discern six major challenges to the constitutionality of

section 893.135, one directed at the mandatory penalties, and five directed at the escape valve in subsection (3). The state also half-heartedly challenges the appellees' standing for the first time on this appeal. This last challenge being the easiest to treat, we discuss it first.

1. Standing

The basic rule governing the standing of parties challenging statutory enactments was recently stated in *Sandstrom v. Leader*, 370 So.2d 3, 4 (Fla. 1979):

> Fundamental constitutional principles dictate that one may not challenge those portions of an enactment which do not adversely affect his personal or property rights . . . Such a personal stake in the outcome of the controversy is necessary "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions[.]" (citations omitted).

The state argues that, because appellees have not yet been convicted, they have no personal stake in this penalty-oriented statute.

To state the assertion is to demonstrate its absurdity. A party subject to criminal prosecution clearly has a sufficient personal stake in the penalty which the offense carries. This is wholly unlike cases in which criminal defendants have challenged portions of a statute which have nothing to do with their prosecution. See *State v. Millington*, 377 So.2d 685 (Fla. 1979); *State v. Champe*, 373 So.2d 874 (Fla. 1978).

2. Cruel and Unusual Punishment

Appellees argue that the mandatory minimum sentences of section 893.135(1) violate the cruel and unusual punishment clauses of the state[1] and federal[2] constitutions. Relying on various death penalty decisions of the United States Supreme Court,[3] they first contend that the mandatory minimum sentences unconstitutionally eliminate the exercise of discretion in sentencing. This argument was rejected by this Court in *McArthur v. State*, 351 So.2d 972 (Fla. 1977), and warrants no further discussion here.

Appellees also argue that the mandatory sentences in section 893.135 constitute cruel and unusual punishment since they are unnecessarily severe and disproportionate to the nature of the crime. This Court has consistently upheld minimum mandatory sentences, regardless of their severity, against constitutional attacks arguing cruel and unusual punishment. See, e.g., *McArthur v. State*, 351 So.2d 972 (Fla. 1977); *Banks v. State*, 342 So.2d 469 (Fla. 1967); *O'Donnell v. State*, 326 So.2d 4 (Fla. 1975). The dominant theme which runs through these decisions is that the legislature, and not the judiciary, determines maximum and minimum penalties for violations of the law. While it is often said that in an extreme case—wherein the sentence was *grossly*

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[1]Art. I, §17, Fla. Const.

[2]U.S. Const. amend. VIII.

[3]*Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, L.Ed.2d 973 (1978); *Woodson v. North Carolina*, 428 U.S. 289, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976).

disproportionate to the severity of the crime—the legislature's judgment would run afoul of the constitutional prohibition, this Court has never addressed such a situation in the context of statutory sentencing minima.

The recent decision of the United States Supreme Court in *Rummel v. Estelle*, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980), indicates that similar considerations prevail under the federal constitution. In that case, the Court held that a mandatory life sentence imposed on the petitioner pursuant to a Texas recidivist statute did not constitute cruel and unusual punishment under the eighth amendment. The majority's analysis of this area noted that:

> [t]his Court has on occasion stated that the Eighth Amendment prohibits imposition of a sentence which is grossly disproportionate to the severity of the crime . . . In recent years this proposition has appeared most frequently in opinions dealing with the death penalty . . . Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishment to capital cases are of limited assistance in deciding the constitutionality of the punishment metted out to Rummel.
>
> Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.

Id., 445 U.S. at 271, 100 S.Ct. at 1138 (citations omitted).

After analyzing one of these rare successful challenges, *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910), the majority concluded:

> Given the unique nature of the punishments considered in *Weems* and in the death penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.

Id., at 445 U.S. at 273, 100 S.Ct. at 1139 (footnote omitted).

The penalties imposed by section 893.135 are certainly severe, but they are by no means cruel and unusual in light of their potential deterrent value and the seriousness of the crime involved. See *McArthur v. State; O'Donnell v. State;* accord, *People v. Broadie*, 37 N.Y.2d 100, 371 N.Y.S.2d 471, 323 N.E.2nd 338, cert. denied, 423 U.S. 950, 96 S.Ct. 372, 46 L.Ed.2d 287(1975).

3. Due Process—Vagueness

Little discussion is needed concerning appellees' suggestion that subsection (3) is impermissibly vague in defining a convicted defendant who is eligible for lenient treatment as "any person . . who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-

conspirators, or principals." Being a description of a *post-conviction* form of plea bargaining rather than a definition of the crime itself, the phrase "substantial assistance" can tolerate subjectivity to an extent which normally would be impermissible for penal statutes. *Cf. Linville v. State*, 359 So.2d 450 (Fla. 1978) (statutory definition of proscribed activity held unconstitutionally vague). The contested phrase, in any event, is susceptible of common understanding in the context of the whole statute. *Schultz v. State*, 361 So.2d 416 (Fla. 1978). There is no due process infirmity.

4. Equal Protection

Appellees' suggestion that subsection (3) denies equal protection of the law to convicted defendants who cannot provide "substantial assistance" to law enforcement officials is patently without merit. This legislation manifestly passes the rational basis test. See *Hamilton v. State*, 366 So.2d 8 (Fla. 1978).

5. Separation of Powers

Two basic arguments by appellees are directed at Florida's constitutional separation of governmental powers. Art. II, §3, Fla. Const. First, they assert that subsection (3) encroaches on the Court's rulemaking role, Art. V, §2(a), Fla. Const., in that it conflicts with Rule 3.800(b), Rule 3.720(b), and Rule 3.171 of the Florida Rules of Criminal Procedure. The statute differs from these rules, of course, but it in no way so conflicts with them as to offend the constitution.

Rule 3.800(b) permits the reduction of legal sentences, yet since it specifically excludes minimum mandatory

sentences from its operation, its procedures obviously are not incompatible with section 893.135. Likewise, Rules 3.720(b) and 3.171 do not pose any obstacle to the operation of section 893.135. Rule 3.720(b) provides that at a sentencing hearing, the court shall "[e]ntertain submissions and evidence by the parties which are relevant to the sentence . . ." Subsection (3) states that "[t]he arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any [motion for reduction or suspension of sentence]." The statute does not explicitly exclude the defendant from submitting evidence in his behalf, and it does not offend the statutory scheme to afford him that right. Finally, applicable procedural safeguards in Rule 3.171 can be afforded to defendants, to the extent they do not conflict with the explicit language of subsection (3). No infirmity of constitutional dimension attends the omission of those that do.

Appellees' second argument premised on the constitutional separation of powers is that subsection (3) usurps the sentencing function from the judiciary and assigns it to the executive branch, since the benefits of subsection (3) are triggered by the initiative of the state attorney. Under the statute, the ultimate decision on sentencing resides with the judge who must rule on the motion for reduction or suspension of sentence. "So long as a statute does not wrest from courts the *final* discretion to impose sentence, it does not infringe upon the constitutional division of responsibilities." *People v. Eason*, 40 N.Y.2d 297, 301, 386 N.Y.S.2d 673, 676, 353 N.E.2d 587, 589 (1976) (emphasis on original) (rejecting a separation of powers attack on a similar provision in New York's drug laws).

6. Self-incrimination

Finally, the appellees argue that section 893.135 coerces a defendant into relinquishing his fifth amendment privilege against self-incrimination by denying him sentencing leniency unless he cooperates with the authorities. We reject this argument, primarily because it depends on unwarranted assumptions about the nature of the informer's disclosures. Nothing in the statute suggests that "substantial assistance" must incriminate the defendant of crimes other than those for which has has already been convicted (and for which no fifth amendment privilege is obviously necessary). We acknowledge the risk of prosecution in other jurisdictions. Nonetheless, a defendant need not invoke subsection (3), as nothing in the statute is compulsive. Putting a defendant to a difficult choice is not necessarily forbidden by the fifth amendment. See, e.g., *Corbitt v. New Jersey*, 439 U.S. 212, 218, 99 S.Ct. 492, 497, 58 L.Ed.2d 466 (1978) ("[N]ot every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid." (footnote omitted); *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978); *McGautha v. California*, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971). No constitutional deprivation results if a defendant elects to reap the benefits of subsection (3).

With respect to those cases which say that the trial courts may not enhance a sentence based on a defendant's failure to cooperate with the authorities, see *United States v. Garcia*, 544 F.2d 681 (3rd Cir. 1976); *United States v. Acosta*, 501 F.2d 1330 (5th Cir. 1974), (Gee, J., dissenting), adopted en banc, 509 F.2d 539 (5th Cir.), cert. denied, 423 U.S. 891, 96 S.Ct. 188, 46 L.Ed.2d

122 (1975); *United States v. Rogers*, 504 F.2d 1079 (5th Cir. 1974), cert. denied, 422 U.S. 1042, 95 S.Ct. 2655, 45 L.Ed.2d 693 (1975), we believe that *Roberts v. United States*, 445 U.S. 552, 100 S.Ct. 1358, 63 L.Ed.2d 622 (1980), went a long way toward resolving this issue against apellees. The Court in *Roberts* concluded that the district court properly considered the defendant's refusal to cooperate as one factor in imposing consecutive sentences. Admittedly, a fifth amendment claim was not properly raised in *Roberts* and "would have merited serious consideration" if it had been. *Id.* at 1364, 100 S.Ct. at 559. We conclude, however, that for fifth amendment purposes the situation in *Roberts* is distinguishable from that here. A sentence reduction obtained by a sentenced convict due to his cooperation is not tantamount to the enhancement of a sentence imposed on an unsentenced, but convicted defendant as a result of his lack of cooperation. The former is no different from a gratuitous sentence reduction offered to one already incarcerated who, even without statutory sanction, risks reincrimination in exchange for early release benefits.

Our disposition of appellees' challenges obviates the need to consider the severability of subsection (3) from the statute. We hold that section 893.135 is constitutional. The order of the trial court is reversed, and the case is remanded for further proceedings.

SUNDBERG, C.J., and ADKINS, BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur.

APPENDIX D

893.135 Trafficking; mandatory sentences; suspension or reduction of sentences.

(1) Except as authorized in this chapter or in chapter 500:

(a) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, in excess of 100 pounds of cannabis is guilty of a felony of the first degree, which felony shall be known as "Trafficking in cannabis". If the quantity of cannabis involved:

(1) Is in excess of 100 pounds, but less than 2,000 pounds, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $25,000.00.

(2) Is 2,000 pounds or more, but less than 10,000 pounds, such person shall be sentenced to a mandatory minimum term of imprisonment of 5 calendar years and to pay a fine of $50,000.00.

(3) Is 10,000 pounds or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and to pay a fine of $200,000.00.

* * *

(2) Notwithstanding the provisions of s. 948.01, with respect to any person who is found to have violated this section, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall

such person be eligible for parole prior to serving the mandatory minimum term of imprisonment prescribed by this section.

(3) The state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if he finds that the defendant rendered such substantial assistance.

Opposition

Office - Supreme Court, U.S.
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FEB 8 1982
ALEXANDER L. STEVAS,
CLERK

CASE NO. 81-836

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

RUSSELL LEIGHT,
Petitioner,

vs.

THE STATE OF FLORIDA,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Florida

BRIEF OF RESPONDENT ON JURISDICTION

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QUESTION PRESENTED

Whether Section 893.135, Florida Statutes is unconstitutional in that it is violative of the constitutional protections addorded by the Due Process clause; the Equal Protection clause and the prohibition against self-incrimination.

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PREFACE

The Petitioner was the Appellee in the Supreme Court of Florida, and Defendant in the Florida trial court. The Respondent, the State of Florida, was the Appellant in the Supreme Court and the prosecution in the trial court. In this brief, the parties will be referred to as they appeared in the Florida trial court below.

The following references is made in this brief:

(A) For the portions of the record offered to show jurisdiction in this court, which are contained in the Petitioner's Appendix.

I

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at State v. Leicht, 402 So.2d 1153 (Fla. 1981). There is no official reporter for citation to this opinion.

II

JURISDICTION

The Defendant has styled his brief herein as a "petition for certiorari." However, the jurisdiction of this Court should have been properly invoked as a direct appeal under the provisions of Title 28, United States Code, §1257(2) and Amendments IV, V, VI, VIII and XIV of the United States Constitution.

III

CONSTITUTION AND STATUTORY PROVISIONS

The Defendant's brief on his "Petition for Certiorari" claims error based upon the Fourth, Fifth, Sixth, Eight and Fourteenth Amendments of the United States Constitution and Section 893.135, Florida Statutes.

IV

SUMMARY OF ARGUMENT

The present claims are not final and should be dismissed.

The present statute, Section 893.135, Florida Statutes is not unconstitutional, but rather is wholly consistent with recent decisions of this Court and traditional analysis.

V

ARGUMENT

A. NON-FINALITY

The present Petition evolves from a circumstance wherein the Florida trial court declared Section 893.135 Florida Statutes unconstitutional in a criminal trial proceeding and thereupon dismissed the charges against the Defendant. The Supreme Court of Florida reversed consistent with State v. Benitez, 395 So.2d 514 (Fla. 1981).

There has been neither a trial on the merits nor a conviction of the Defendant. Section 1257(2) of 28 U.S.C. limits the jurisdiction of this Court to, "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had...."
Where there is neither a trial on the merits nor a conviction and sentence, this

Court has no jurisdiction and the cause should be dismissed. See, Flynt v. Ohio, ___U.S.___, 101 S.Ct. 1958 (1981); see, also, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

B. NO SUBSTANTIAL FEDERAL QUESTION

Each of the Defendant's constitutional complaints of are easily rejected based upon settled principles of federal constitutional analysis. In Roberts v. United States, ___U.S.___, 100 S.Ct. 1358 (1980) the defendant, a heroin dealer, refused to cooperate with police in the further investigation of narcotics traffic in his community. 100 S.Ct. at 1362. The trial court therefore meted out a more severe sentence that if the defendant had co-operated. Id. In sustaining the more severe sentence the Roberts court held 1) that part of the defendants rehabilitation would be in cooperation with law-enforcement in exposing crime in his community and 2) that there was no record basis for any claim of self-incrimination or coercion. 100 S.Ct. at 1363-1365. As

in Roberts, in the case at bar there is not a shred of evidence that the Defendant has been compelled or coerced to do anything. Indeed, under settled principles of constitutional analysis, to infringe upon the Fifth Amendment prohibition, the testimony must be both compelled and used against the defendant. See, Lefkowitz v. Cunnigham, 431 U.S. 801, at 804-805 (1977). Without use against the defendant, there is no prohibition under the Fifth Amendment. See,United States v. ManDujano, 340 U.S. 367 (1951). Furthermore, the central issue under the Fifth Amendment is not whether the Defendant has a difficult choice but whether he has a choice. See, McGautha v. California, 402 U.S. 183, at 212-213 (1971); North Carolina v. Alford, 400 U.S. 25 (1970); Brady v. United States, 397 U.S. 742 (1970). The present statute presents the Defendant

only with a difficult choice and is therefore not in violation of any constitutional precepts.

The Defendant's claims that Section 893.135 denies due process and the statute imposes cruel and unusual punishment are similarly wholly without merit. In Bordenkircher v. Hayes, 434 U.S. 357 (1978) the prosecutor in pretrial plea bargaining had told the defendant, the defendant's plea to a term of five years in prison would be acceptable, but that if the defendant did not plead guilty, that he, the prosecutor, would seek a grand jury indictment against the defendant an an habitual offender, which required a mandatory life sentence. 434 U.S. at 359. The defendant in Bordenkircher chose not to plead guilty and was subsequently convicted and sentenced to life. Id at 360. In framing the issue, the Bordenkircher court

specifically held that:

"As a practical matter, in short, this case would be no different if the grand jury had indicted Hayes as a recidivist from the outset, and the prosecutor had offered to drop that charge as part of the plea bargain." [Emphasis added].

Id.

Addressing the principles which are clearly controlling herein, the court further opined that:

"By hypothesis, [a] plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after trial. See ABA Standards Relating to Pleas of Guilty §3.1 (1968); Note, Pleas of Bargaining and the Transformation of the Criminal Process, 90 Jarv.L.Rev. 564 (1977). Cf. Brady v. United States, supra, 397 U.S., at 751, 90 S.Ct., at 1470; North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162.

While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant's assertion to his trial rights, the imposition of these difficult choices [is] an inevitable--and permissible--attribute of any legitimate system which tolerates and encourages the negotiation of pleas." [Emphasis added].

Id, at 364.

Relying upon its decision in Bordenkircher, in Corbitt v. New Jersey, ___U.S. ___, 99 S.Ct. 492 (1978), the court also found no constitutional disability in circumstances analogous to those possible under the statute in the case at bar. In Corbitt through a complex New Jersey system of homicide statutes, if the defendant went to trial and was convicted of first degree murder the trial judge must sentence him to life imprisonment. 99 S.Ct. at 495. If the defendant pleaded nolo contendere to the trial court and the trial court accepts his plea he could be sentenced to a sentence of "not more than 30 years" or life in the complete discretion of the trial court. 99 S.Ct. at 495-497. The Corbitt defendant chose to go to trial and was convicted of a first degree murder offense and sentenced to the mandatory life term under the statute. 99 S.Ct. at

495-496. In rejecting the defendant's multiple constitutional claims under the Fifth, Sixth and Fourteenth Amendments, the Corbitt court held that:

"As did the New Jersey Supreme Court, we disagree. The cases in this Court since Jackson have clearly established that not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid. Specifically, there is no per se rule against encouraging guilty pleas. We have squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea. The plea may obtain for the defendant not only "the possibility or certainty. . . [of] a lesser penalty than the sentence that could be imposed, after a trial and a verdict of guilty. . .," Brady v. United States, 397 U.S. 742, 751, 90 S.Ct. 1463, 1470, 25 L.Ed.2d 747 (1970), but also of a lesser penalty than that required to be imposed after a guilty verdict by a jury."

The Corbitt court concluded its analysis, relying upon Bordenkircher thus:

"While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an evitable'--and permissible--' attribute of any legitimate system which

tolerates and encourages the negotiation of pleas.' Chaffin v. Stynchcombe, supra, at 31 (93 S.Ct. 1977). It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutional legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty." 434 U.S., at 364, 98 S.Ct., at 668."

99 S.Ct. at 498.

In the case at bar, after his conviction, sentence and appeal, the Defendant has two choices under the statute. He may either serve the lawful term of his imprisonment or he may seek the benefit of mitigation of his sentence by substantial cooperation with the authorities. Under Corbitt, Bordenkircher and Brady and its progeny, there is simply no constitutional disability in merely providing the Defendant with the choice of "grim alternatives" upon his conviction for trafficking in narcotics in Florida.

Trafficking in narcotics is indeed heinous crime, which is tearing at the very fabric of our society. Clearly the legislative puspose in providing more severe penalties for such a crime has a rational basis and therefore is manifesting devoid of any defect under an equal protection claim. See, analysis in, Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976); Marshall v. United States, 414 U.S. 417, at 421-422 (1974); see also, Albernaz v. United States, ___U.S.___, 101 S.Ct. 1137 (1981). Additionally, the severity of the penalties in Section 893.135 also cannot be seriously assailed under any theory under the Eighth Amendment. See, Rummel v. Estelle, ___U.S.___, 100 S.Ct. 1133 (1980). The extent and nature of crimes and their punishment is an exclusive legislative perogative into which no court may intrude. Id.

V

CONCLUSION

WHEREFORE, upon the foregoing, the Respondent, THE STATE OF FLORIDA, prays that this Honorabel Court will enter its order affirming the judgment below.

RESPECTFULLY SUBMITTED, on this ____ day of February, 1982, at Tallahassee, Leon County, Florida.

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